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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 MATCONUSA LP,

11 Plaintiff,

12 v.

13 HOUSTON CASUALTY  
COMPANY, et al.,

14 Defendants.  
15

CASE NO. C19-1952JLR-TLF

ORDER ADOPTING REPORT  
AND RECOMMENDATION

16 **I. INTRODUCTION**

17 This matter comes before the court on the Report and Recommendation of United  
18 States Magistrate Judge Theresa L. Fricke (R&R (Dkt. # 59)) and the objections thereto  
19 filed by Defendant Marsh USA Inc. (“Marsh”) (Obj. (Dkt. # 65)). Magistrate Judge  
20 Fricke recommends to the court that it grant in part and deny in part Marsh’s motion to  
21 dismiss (MTD (Dkt. # 43)). (R&R at 1.) Plaintiff MatconUSA LP (“Matcon”) and  
22 Defendant Houston Casualty Company (“HCC”) responded to Marsh’s objections.

(Matcon Resp. (Dkt. # 66); HCC Resp. (Dkt. # 67).) The court has carefully reviewed the foregoing documents, the balance of the record, and the applicable law. Being fully advised,<sup>1</sup> the court ADOPTS the Report and Recommendation and GRANTS in part and DENIES in part Marsh’s motion to dismiss.

## II. BACKGROUND

Because the Report and Recommendation sets forth the detailed factual and procedural background of this case (*see* R&R at 1-5), the court focuses here on the background relevant to Marsh’s motion to dismiss.

This action arises out of a construction project at 1200 Stewart Street in Seattle, Washington (“the Project”). (SAC (Dkt. # 30) ¶ 7.) As part of the Project, Matcon enrolled as an insured in an Owner Controlled Insurance Program (“OCIP”) administered by Marsh. (*Id.* ¶ 12; *see also* Dkt. # 47-1 (“Project Insurance Manual”).<sup>2</sup>) An OCIP is a type of “wrap-up insurance program” that is purchased to insure large construction projects such as the Project. (SAC ¶ 7.) The OCIP includes a primary liability policy issued by HCC. (*Id.* ¶ 9.)

Matcon alleges that, according to the claim reporting provisions of the Project Insurance Manual issued by Marsh, enrolled contractors such as Matcon were to report claims for injury to the public or damage to property within the Project construction site

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<sup>1</sup> Marsh requested oral argument. (Obj. at 1.) The court, however, finds oral argument unnecessary to its disposition of Marsh’s objections. *See* Local Rules W.D. Wash. LCR 7(b)(4).

<sup>2</sup> As discussed below, the court grants Matcon’s request to consider certain documents that its second amended complaint refers to and relies upon. *See infra* § III.B.

1 “to the Owner and General Contractor with a copy to Marsh.” (*Id.* ¶¶ 13-15; *see* Project  
 2 Insurance Manual at 13.) In October 2018, the Project’s general contractor, Graham  
 3 Construction & Management, Inc. (“Graham”) alleged that Marsh was liable for property  
 4 and other damage at the Project. (SAC ¶ 17.) Matcon states that it immediately reported  
 5 Graham’s damage claim “in the manner specified by the Project Insurance Manual . . . by  
 6 also sending a copy of the [c]laim to Marsh.” (*Id.* ¶ 18.) Graham asserted additional  
 7 claims against Matcon in November, which Matcon again reported “as specified in the  
 8 Project Insurance Manual” by sending the claims to Marsh. (*Id.* ¶¶ 20-21.) Matcon  
 9 received no response from either HCC or Marsh to its attempts to report those claims.  
 10 (*See id.* ¶¶ 19, 22.) Graham then terminated Matcon from the Project and withheld  
 11 payment for work Matcon had already completed. (*Id.* ¶ 23.) Matcon subsequently made  
 12 two additional requests for insurance benefits by providing copies of its claims to Marsh  
 13 but again did not receive any response from HCC or Marsh. (*See id.* ¶¶ 24-28.) In  
 14 relevant part, Matcon now alleges claims against Marsh for negligence (*see id.* ¶¶ 55-57)  
 15 and for tortious interference with economic relations (*see id.* ¶¶ 58-63).

### 16 III. ANALYSIS

17 Magistrate Judge Fricke recommends that the court: (1) consider certain  
 18 documents that the parties submitted in support of or in opposition to Marsh’s motion to  
 19 dismiss (*see* R&R at 6-11); (2) deny Marsh’s motion to dismiss Matcon’s negligence  
 20 claim (*see id.* at 11-17); and (3) grant Marsh’s motion to dismiss Matcon’s tortious  
 21 interference with business relationships claim without prejudice (*see id.* at 17-18). Marsh  
 22 objects to Magistrate Judge Fricke’s recommendations that the court consider six

1 documents submitted by Matcon (Obj. at 6-8) and deny Marsh's motion to dismiss  
2 Matcon's negligence claim (*id.* at 9-14). No party objects to Magistrate Judge Fricke's  
3 recommendation that the court dismiss Matcon's tortious interference claim. (*See* R&R  
4 at 17-18; *see generally* Dkt.)

5 The court begins by reviewing Magistrate Judge Fricke's recommendation to  
6 consider certain documents in deciding the motion to dismiss before turning to her  
7 recommendation to deny Marsh's motion to dismiss Matcon's negligence claim.

#### 8 **A. Standard of Review**

9 A district court has jurisdiction to review a magistrate judge's report and  
10 recommendation on dispositive matters. *See* Fed. R. Civ. P. 72(b). "The district judge  
11 must determine de novo any part of the magistrate judge's disposition that has been  
12 properly objected to." *Id.* "A judge of the court may accept, reject, or modify, in whole  
13 or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C.  
14 § 636(b)(1). The court reviews de novo those portions of the report and recommendation  
15 to which specific written objection is made. *United States v. Reyna-Tapia*, 328 F.3d  
16 1114, 1121 (9th Cir. 2003) (*en banc*).

#### 17 **B. Requests to Consider Documents**

18 Marsh objects to Magistrate Judge Fricke's recommendation that the court  
19 consider six documents that Matcon offered to support its opposition to Marsh's motion  
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1 to dismiss.<sup>3</sup> (Obj. at 6-8.) Although the scope of review on a motion to dismiss for  
 2 failure to state a claim is generally limited to the complaint, a court may consider  
 3 evidence on which the complaint “necessarily relies” if: (1) the complaint refers to the  
 4 document; (2) the document is central to the plaintiff’s claim; and (3) no party questions  
 5 the authenticity of the document. *Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998  
 6 (9th Cir. 2010) (quoting *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (internal  
 7 quotation marks omitted)). The court’s consideration of the documents, however, is  
 8 limited by the principle that it may not draw inferences or take notice of facts that might  
 9 reasonably be disputed on the basis of those documents. *United States v. Corinthian*  
 10 *Colls.*, 655 F.3d 984, 999 (9th Cir. 2011).

11 Marsh does not dispute the authenticity of the documents. (*See generally* Obj.) It  
 12 asserts, however, that Matcon’s second amended complaint does not refer to the  
 13 documents and that the documents are not central to Matcon’s claims. (*Id.* at 6-8.) As a  
 14 result, according to Marsh, Magistrate Judge Fricke erred when she considered the  
 15 documents in evaluating Marsh’s motion to dismiss. The court disagrees and adopts  
 16 Magistrate Judge Fricke’s recommendation regarding the documents.

17 First, Marsh objects to Magistrate Judge Fricke’s consideration of four emails  
 18 from Matcon Project Manager Sylvia Bourgeois to Marsh’s OCIP Program Manager,  
 19 Natalie Cordova, which attach copies of the insurance claims that Matcon submitted

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21 <sup>3</sup> Marsh agrees, however, with Magistrate Judge Fricke’s recommendation that the court  
 22 consider the Project Insurance Manual because Matcon’s complaint “relies on it extensively.”  
 (*See* Obj. at 7 (citing SAC ¶¶ 13-16, 18, 21, 55).)

1 through Marsh's OCIP Claim Portal. (Obj. at 7-8 (citing Dkt. ## 47-2, 47-3, 47-4, 47-5).)  
2 Matcon's complaint, however, explicitly refers to the four emails—and quotes two of  
3 them. (*See* SAC ¶¶ 18, 21, 24, 27.) These emails are central to Matcon's claim because,  
4 absent an allegation that it put Marsh on notice of its claim, it would have no ground to  
5 allege that Marsh breached a duty when it failed to apprise HCC of the claims that  
6 Matcon had sent to it. (*See id.* ¶¶ 55-57; Matcon Resp. at 3.) Therefore, the court adopts  
7 that portion of Magistrate Judge Fricke's Report and Recommendation recommending  
8 that the court consider the four emails from Ms. Bourgeois to Ms. Cordova.

9       Second, Marsh objects to Judge Fricke's consideration of two documents relating  
10 to the OCIP at issue in this case: a Certificate of Liability Insurance for operations at the  
11 Project site, which identifies Marsh as the "Producer" and Matcon as the  
12 "Insured" (Dkt. # 48-2 ("Certificate")); and an Engagement Letter from Marsh to the  
13 Project owner, Westbank Holdings US Ltd. ("Westbank"), which lists the services that  
14 Marsh would provide as insurance broker for the Project and the terms and conditions for  
15 those services (Dkt. # 48-7 ("Engagement Letter")). (Obj. at 8.) First the court agrees  
16 that the Certificate of Liability Insurance is properly before the court because Matcon's  
17 claims depend on its enrollment in the OCIP administered by Marsh. (*See* R&R at 10.)  
18 Second, the court agrees that the Engagement Letter is properly before the court. As  
19 Judge Fricke observed, the Engagement Letter lays out the terms and conditions of the  
20 OCIP that forms the basis of Matcon's complaint. (*See id.*) Although the complaint does  
21 not expressly refer to the Engagement Letter, it repeatedly refers to Marsh's duties under  
22 the Project Insurance Manual. (*See generally* SAC). The Project Insurance Manual in

1 turn states that it provides “only a general overview of the OCIP for convenience of  
2 reference” and that the provisions in the manual are “subject in all respects to the terms  
3 and conditions of the actual insurance policies and related contracts between the parties.”  
4 (See Project Insurance Manual at 3.) Thus, the court agrees with Magistrate Judge Fricke  
5 that the complaint necessarily relies on the Engagement Letter because the Project  
6 Insurance Manual—which all parties agree is properly before the court—incorporates the  
7 terms and conditions contained in the Engagement Letter. (See R&R at 10.)  
8 Accordingly, the court ADOPTS that portion of the Report and Recommendation  
9 regarding the documents to consider in evaluating Marsh’s motion to dismiss.

#### 10 **C. Matcon’s Negligence Claim**

11 Marsh objects to Magistrate Judge Fricke’s recommendation that the court deny  
12 Marsh’s motion to dismiss Matcon’s negligence claim because Matcon “fail[ed] to plead  
13 that Marsh breached any duty found in the [E]ngagement [L]etter.” (Obj. at 9.) It asserts  
14 that Magistrate Judge Fricke erred in her analysis of the six-factor test set forth in *Trask*  
15 *v. Butler*, 872 P.2d 1080, 1083 (Wash. 1994), in determining that Marsh owed Matcon a  
16 duty as a non-client third party. (Obj. at 10-14.) The court considers these arguments  
17 below.

##### 18 1. Standard of Review

19 Federal Rule of Civil Procedure 12(b)(6) provides for dismissal for “failure to  
20 state a claim upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). When  
21 considering a motion to dismiss under Rule 12(b)(6), the court construes the complaint in  
22 the light most favorable to the nonmoving party. *Livid Holdings Ltd. v. Salomon Smith*

1 *Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pleaded  
2 facts as true and draw all reasonable inferences in favor of the plaintiff. *Wylar Summit*  
3 *P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). The court,  
4 however, is not required "to accept as true allegations that are merely conclusory,  
5 unwarranted deductions of fact, or unreasonable inferences." *Sprewell v. Golden State*  
6 *Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). "To survive a motion to dismiss, a  
7 complaint must contain sufficient factual matter, accepted as true, to 'state a claim to  
8 relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting  
9 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Telesaurus VPC, LLC v.*  
10 *Power*, 623 F.3d 998, 1003 (9th Cir. 2010). "A claim has facial plausibility when the  
11 plaintiff pleads factual content that allows the court to draw the reasonable inference that  
12 the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 677-78. Dismissal  
13 under Rule 12(b)(6) can be based on the lack of a cognizable legal theory or the absence  
14 of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police*  
15 *Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

## 16 2. Analysis

17 To state a claim for negligence under Washington law, a plaintiff must allege (1)  
18 the existence of a duty; (2) breach of that duty; (3) resulting injury; and (4) that the  
19 breach was a proximate cause of that injury. *Ranger Ins. Co. v. Pierce Cnty.*, 192 P.3d  
20 886, 889 (Wash. 2008). "A duty of care is 'an obligation, to which the law will give  
21 recognition and effect, to conform to a particular standard of conduct toward another.'"  
22



1 *Centurion Props. III, LLC v. Chi. Title Ins. Co.*, 375 P.3d 651, 654 (Wash. 2016) (quoting  
2 *Affil. FM Ins. Co. v. LTK Consulting Servs., Inc.*, 243 P.3d 521, 525 (Wash. 2010)).

3 Matcon asserts that Marsh “had duties to Matcon under the OCIP Insurance  
4 Manual and under applicable law” and that it breached these duties “in many ways,  
5 including but not limited to failing to apprise or notify [HCC] or any other potentially  
6 responsible OCIP insurance companies of Matcon’s numerous requests for OCIP  
7 insurance benefits.” (SAC ¶¶ 55-56.) In its motion to dismiss, Marsh argued that  
8 Matcon’s negligence claim must be dismissed because Matcon failed to plausibly allege  
9 that Marsh owed it any duty. (MTD at 4-5.) Marsh argued that the terms of the Project  
10 Insurance Manual contradict Matcon’s allegation that Marsh owed it a duty to notify  
11 HCC about Matcon’s dispute with Graham. (*Id.* at 5.) It contended that the terms of the  
12 Project Insurance Manual showed definitively that Marsh’s only responsibility with  
13 respect to claim reporting under the OCIP was merely “administrative” – that is, its duty  
14 was “simply to keep track of a Claim by receiving a ‘copy’ of lawsuits against OCIP  
15 insureds.” (*Id.* at 5-7 (citing Project Insurance Manual at 13).)<sup>4</sup>

16 It is true that the Claim Reporting page of the Project Insurance Manual refers, in  
17 two bold-face sentences, to “lawsuits/summons.” (*See* Project Insurance Manual at 13.)  
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19 <sup>4</sup> Marsh also asserted that Matcon’s negligence claim must fail under the independent  
20 duty doctrine, which limits a party’s ability to assert a tort claim under certain circumstances  
21 where a contract exists between the parties. (MTD at 9-10); *see Eastwood v. Horse Harbor*  
22 *Found.*, 241 P.3d 1256, 1261-62 (Wash. 2010). As Magistrate Judge Fricke correctly  
recognized, however, Matcon does not allege that it had a contractual relationship with Marsh.  
(*See* R&R at 12; *see generally* SAC.) No party objects to Magistrate Judge Fricke’s conclusion  
that the independent duty doctrine does not bar Matcon’s negligence claim. (*See generally* Dkt.)

1 In the discussions that follow the bold-face sentences, however, the instructions refer to  
2 “Claims.” (*See id.*) Because “Claim” is undefined in the Project Insurance Manual,  
3 however, it is unclear whether a “Claim” refers only to a lawsuit or summons, or more  
4 broadly to any potential claim that could be brought under the OCIP. (*See generally id.*)  
5 The court concludes that the interpretation of the Claim Reporting language and whether  
6 it bars Matcon’s claim that Marsh assumed a duty pursuant to that language to report  
7 Matcon’s claims to HCC depend on questions of fact that are inappropriate to resolve at  
8 this stage of the proceedings.

9 In its reply, Marsh contended that it could not owe *any* duty to Matcon since  
10 Matcon was not Marsh’s customer and was not in a contractual relationship with Marsh.  
11 (*See* MTD Reply (Dkt. # 49) at 11-12.) In resolving this dispute, Magistrate Judge Fricke  
12 applied the six factors set out in *Trask* and determined that Matcon had sufficiently  
13 pleaded that Marsh owed it a tort duty as a non-client third party. (*See* R&R at 12-17.)  
14 The *Trask* factors ask the court to evaluate: (1) the extent to which the transaction was  
15 intended to benefit the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the  
16 degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection  
17 between the defendant’s conduct and the injury; (5) the policy of preventing future harm;  
18 and (5) the extent to which the profession would be unduly burdened by a finding of  
19 liability. (R&R at 12-13 (citing *Centurion Props.*, 375 P.3d at 657-58).) The threshold  
20 question in this analysis is whether the non-client is an intended beneficiary of the  
21 transaction in question. *See Centurion Props.*, 375 P.3d at 658. If the first *Trask* factor is  
22 not met, then the court need make no further inquiry into the defendant’s duty. *Id.*

1 Magistrate Judge Fricke concluded that Matcon's second amended complaint satisfied all  
2 six of the *Trask* factors. (*See* R&R at 12-17.)

3 The court agrees with and adopts Magistrate Judge Fricke's analysis of the *Trask*  
4 factors. First, the court agrees that the OCIP and Marsh's appointment as administrator  
5 of the OCIP were intended to benefit Matcon. (*See* R&R at 14-15.) As the Washington  
6 Court of Appeals has recognized,

7 It is not an uncommon practice in construction contracts for the owner to  
8 agree to purchase insurance to protect the interests of some or all of the  
9 contractors, subcontractors, and materialmen. An agreement to insure is an  
agreement to provide both parties with the benefit of insurance regardless of  
the cause of the loss (excepting wanton and willful acts).

10 *W. Wash. Corp. of Seventh-Day Adventists v. Ferrellgas, Inc.*, 7 P.3d 861, 870 (Wash. Ct.  
11 App. 2000) (quoting *Ind. Erectors, Inc. v. Trs. of Ind. Univ.*, 686 N.E. 2d 878, 880-81  
12 (Ind. App. 1997)). Here, Matcon alleges that it was one of many subcontractors enrolled  
13 in the OCIP, which was purchased by the owner of the Project (Westbank) and  
14 administered by Marsh. (SAC ¶¶ 7-8, 12; *see also* Certificate.) The court finds that the  
15 first *Trask* factor has been met.

16 Second, the court agrees that harm to Matcon was foreseeable under the second  
17 *Trask* factor. (*See* R&R at 15.) Matcon alleges that Marsh had a duty to report claims  
18 sent to it that arose from its role as the OCIP Administration/Insurance Broker, the  
19 Project Insurance Manual, and applicable law. (SAC ¶¶ 32, 55.) As Magistrate Judge  
20 Fricke recognized, it is foreseeable that a failure to report Matcon's insurance claims  
21 would result in harm to Matcon. (*See* R&R at 15.)  
22

1 Third, the court agrees that Matcon alleged to a sufficient degree of certainty that  
2 it suffered harm. (*See* R&R at 15-16.) Matcon alleges that because Marsh failed to  
3 report its claims to HCC, it suffered “real and measurable harm and damage” including  
4 the need to pay for its own defense, the deprivation of early opportunities to resolve  
5 Graham’s damage claims, and substantial and additional overhead, administrative, and  
6 legal expenses that would not otherwise have been incurred had Marsh reported the  
7 claim. (*See* SAC ¶ 31.) For the same reasons, the court agrees that Matcon has  
8 sufficiently alleged facts supporting the fourth *Trask* factor, which requires proof of a  
9 close connection between Marsh’s conduct and the injuries it suffered. (*See id.*)

10 The court also agrees with Magistrate Judge Fricke’s analysis of the fifth and sixth  
11 *Trask* factors: the policy of preventing future harm and the extent to which the profession  
12 would be unduly burdened by a finding of liability. (*See* R&R at 16.) As Magistrate  
13 Judge Fricke recognized, the OCIP and the contracts entered into pursuant to the OCIP  
14 were part of the web of insurance coverage that was intended by the owner  
15 to manage financial risk, keep the project moving forward with effective  
16 management of disputes and delays, and protect the owner and all  
participants in the project from being financially devastated by events during  
construction.

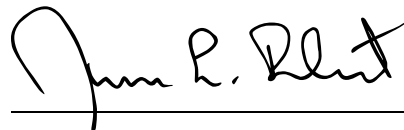
17 (*Id.*) In this context, it would not unduly burden administrators of OCIPs to hold them  
18 accountable to language that, as Matcon alleges, requires them to forward claims by the  
19 OCIP’s insureds to the contracted insurers.

20 In sum, on de novo review, the court agrees with Magistrate Judge Fricke’s  
21 recommendation to deny Marsh’s motion to dismiss Matcon’s negligence claim and  
22 ADOPTS the Report and Recommendation.

**IV. CONCLUSION**

For the foregoing reasons, the court ADOPTS Magistrate Judge Fricke's Report and Recommendation (Dkt. # 59). The court GRANTS in part and DENIES in part Marsh's motion to dismiss (Dkt. # 43). Matcon's tortious interference with economic relations claim is DISMISSED without prejudice and with leave to amend. Matcon may file an amended complaint that remedies the deficiencies outlined in the Report and Recommendation within 14 days of the filing date of this order.

Dated this 22nd day of March, 2021.

A handwritten signature in black ink, appearing to read "James L. Robart", is written over a horizontal line.

JAMES L. ROBART  
United States District Judge